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6 JACK AIELLO and CITY OF SAN CARLOS
7

8 IN THE UNITED STATES DISTRICT COURT
9 IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 JEFFREY A. HOWELL and SHELLEY H.K.
12 HOWELL,

13 Plaintiffs,

14 vs.

15 KENNETH VITORELO, individually and in his
16 capacity as a San Carlos Building Inspector;
17 JACK AIELLO, individually and in his capacity
18 as the San Carlos Building Official; CITY OF
19 SAN CARLOS,

20 Defendants.
21

Case No. C 07-06086 JL

**DEFENDANTS' ANSWER TO
PLAINTIFFS' COMPLAINT**

22 COME NOW Defendants KENNETH VITORELO, JACK AIELLO and CITY OF SAN
23 CARLOS (collectively, "Defendants") and in answer to the complaint on file herein, admit, deny
24 and allege as follows.

I.

INTRODUCTION

25 1. Answering the allegations contained in Paragraphs 1 through 5, Defendants allege
26 that they are without sufficient information or belief to enable them to answer the allegations of

1 said paragraphs and, basing their denial on that ground, deny each and every allegation contained
2 therein.

3 **II.**

4 **JURISDICTION AND VENUE**

5 2. Answering the allegations contained in Paragraphs 6 through 8, Defendants admit
6 that this Court has jurisdiction over Plaintiffs' alleged federal claims, that venue is proper in the
7 Northern District, and that this lawsuit should be assigned to the San Francisco Division of this
8 Court.

9 **III.**

10 **PARTIES**

11 3. Answering the allegations contained in Paragraphs 9 and 10, Defendants allege that
12 they are without sufficient information or belief to enable them to answer the allegations in said
13 paragraphs, and basing their denial on that ground, deny each and every allegation contained
14 therein.

15 4. Defendants admit the allegations contained in Paragraphs 11 through 14.

16 **IV.**

17 **FACTUAL ALLEGATIONS**

18 5. Answering the allegations contained in Paragraphs 15 through 31, Defendants allege
19 that they are without sufficient information or belief to enable them to answer the allegations of
20 said paragraphs and, basing their denial on that ground, deny each and every allegation contained
21 therein.

22 6. Defendants admit the allegations in Paragraph 32.

23 7. Answering the allegations contained in Paragraphs 33 and 34, Defendants allege
24 that they are without sufficient information or belief to enable them to answer the allegations of
25 said paragraphs and, basing their denial on that ground, deny each and every allegation contained
26 therein.

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1 8. Defendants deny each and every allegation in Paragraph 35.

2 9 Answering the allegations contained in Paragraphs 36 through 42, Defendants allege
3 that they are without sufficient information or belief to enable them to answer the allegations of
4 said paragraphs and, basing their denial on that ground, deny each and every allegation contained
5 therein.

6 10. Answering the allegations contained in Paragraph 43, Defendants admit plaintiff
7 received a Notice of violation from the San Carlos Building Department on August 17, 2006 and
8 March 2, 2007. Defendants allege that they are without sufficient information or belief to enable
9 them to answer the remaining allegations of said paragraph and, basing their denial on that ground,
10 deny each and every remaining allegation contained therein.

11 11. Answering the allegations contained in Paragraphs 44 through 58, Defendants allege
12 that they are without sufficient information or belief to enable them to answer the allegations of
13 said paragraphs and, basing their denial on that ground, deny each and every allegation contained
14 therein.

15 12. Answering the allegations contained in Paragraph 59, Defendants admit in early
16 October 2006, plaintiff received a letter dated October 2, 2006 from Inspector Vitorelo stating that
17 Inspector Vitorelo and the Building Department had directed the San Carlos Finance Department to
18 bill plaintiff for the December 19, 2005 inspection. Defendants allege that they are without
19 sufficient information or belief to enable them to answer the remaining allegations of said
20 paragraph and, basing their denial on that ground, deny each and every remaining allegation
21 contained therein.

22 13. Answering the allegations contained in Paragraphs 60 through 68, Defendants allege
23 that they are without sufficient information or belief to enable them to answer the allegations of
24 said paragraphs and, basing their denial on that ground, deny each and every allegation contained
25 therein.

26 14. Defendants admit the allegations in Paragraph 69.

15. Answering the allegations contained in Paragraphs 70 through 80, Defendants allege that they are without sufficient information or belief to enable them to answer the allegations of said paragraphs and, basing their denial on that ground, deny each and every allegation contained therein.

FIRST CLAIM FOR RELIEF

Violation of Civil Rights, 42 U.S.C. § 1983, through Violation of right to be Free from Unreasonable Searches –Against All Defendants

16. Answering Paragraph 81 of the Complaint, Defendants re-allege and incorporate by reference herein their answers to Paragraphs 1 through 80 as though fully set forth herein.

17. Defendants admit the allegations in Paragraph 82.

18. Defendants deny the allegations in Paragraphs 83 through 87.

SECOND CLAIM FOR RELIEF

Violation of Civil Rights, 42 U.S.C. § 1983, for Violation of right to Due Process Against All Defendants

19. Answering Paragraph 88 of the Complaint, Defendants re-allege and incorporate by reference herein their answers to Paragraphs 1 through 87 as though fully set forth herein.

20. Defendants admit the allegations in Paragraph 89.

21. Defendants deny the allegations in Paragraphs 90 through 93.

THIRD CLAIM FOR RELIEF

Violation of Civil Rights, 42 U.S.C. § 1983, through denial of Equal Protection Against All Defendants

23. Answering Paragraph 94 of the Complaint, Defendants re-allege and incorporate by reference herein their answers to Paragraphs 1 through 93 as though fully set forth herein.

24. Defendants admit the allegations in Paragraph 95.

25. Defendants deny the allegations in Paragraphs 96 through 99.]

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FOURTH CLAIM FOR RELIEF

Violation of Civil Rights, 42 U.S.C. § 1983, in Retaliation for Exercise of Free Speech and Association and Right to Petition - Against All Defendants

26. Answering Paragraph 100 of the Complaint, Defendants re-allege and incorporate by reference herein their answers to Paragraphs 1 through 99 as though fully set forth herein.

27. Defendants admit the allegations in Paragraph 101.

28. Defendants deny the allegations in Paragraphs 102 through 105.

FIRST AFFIRMATIVE DEFENSE

These answering defendants allege that the complaint fails to state a cause of action against these answering defendants.

SECOND AFFIRMATIVE DEFENSE

These answering defendants deny any wrongdoing, negligence or liability on their part but, should it be determined that these defendants are liable to plaintiffs, then these defendants allege that plaintiffs were also legally at fault, and possibly others as well, and thus any recovery that might otherwise be rendered against these defendants must be reduced by that percentage which reflects the comparative fault of others.

THIRD AFFIRMATIVE DEFENSE

These answering defendants allege that plaintiffs acted with full knowledge of all the facts and circumstances surrounding their claimed injuries and damages and that said matters of which plaintiffs assumed the risk proximately contributed to and proximately caused their alleged injuries and damages, if any.

FOURTH AFFIRMATIVE DEFENSE

These answering defendants allege their acts were privileged.

FIFTH AFFIRMATIVE DEFENSE

These answering defendants allege that at all times relevant herein, defendants acted without malice and with probable cause.

SIXTH AFFIRMATIVE DEFENSE

These answering defendants allege that each of the acts alleged to have been committed by the individual defendants were committed in good faith and in the exercise of a good faith belief that said acts were proper and lawful and within their legal responsibility and discretion.

SEVENTH AFFIRMATIVE DEFENSE

These answering defendants allege that the acts complained of occurred within the scope of defendants' official duties and defendants had no knowledge that said acts neither were illegal and/or unconstitutional nor were said acts clearly violative of plaintiffs' rights at the time they were committed.

EIGHTH AFFIRMATIVE DEFENSE

These answering defendants allege that plaintiffs were guilty of willful and gross carelessness, misconduct and negligence in and about the matters set forth in the complaint, and that said willful and gross behavior proximately caused and contributed to the happening of the loss and damages complained of, and plaintiffs' willful and gross behavior either bars or reduces any potential recovery.

NINTH AFFIRMATIVE DEFENSE

These answering defendants allege that plaintiffs by their own conduct, induced and intentionally caused and brought about the conduct of which plaintiffs complain, and the loss and damages complained of, and plaintiffs' intentional conduct either bars or reduces any potential recovery.

TENTH AFFIRMATIVE DEFENSE

These answering defendants allege that plaintiffs consented to the acts complained of in the amended complaint and that said consent was both express and implied.

ELEVENTH AFFIRMATIVE DEFENSE

These answering defendants allege that plaintiffs' action is barred by virtue of the provisions of the California Tort Claims Act, including, but not limited to, Government Code §§

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1 815, 815.2, 815.3, 818, 818.2, 818.4, 818.6, 818.8, 820, 820.2, 820.4, 820.6, 820.8, 820.9, 821,
2 821.2, 821.4, 821.6, 821.8, 822.2, 835.4, 905, 910, 911.2, and 945.6.

3 **TWELFTH AFFIRMATIVE DEFENSE**

4 These answering defendants alleges that the amended complaint, and each cause of action
5 therein, is barred by the statutes of limitations set forth in the Code of Civil Procedure §§ 313
6 through 349.4 including, but not limited to, §§ 335.1 and 342.

7 **THIRTEENTH AFFIRMATIVE DEFENSE**

8 These answering defendants contend that plaintiffs' cause of action is barred by virtue of
9 the doctrine of unclean hands.

10 **FOURTEENTH AFFIRMATIVE DEFENSE**

11 These answering defendants allege that plaintiffs have failed to mitigate the alleged
12 damages, if any, which they claim to have sustained, and their recovery, if any, should be barred or
13 diminished accordingly.

14 **FIFTEENTH AFFIRMATIVE DEFENSE**

15 These answering defendants contend that plaintiffs' action is frivolous, unreasonable and
16 without foundation and therefore defendants are entitled to attorneys' fees and costs pursuant to
17 42 U.S.C. §1988 and Code of Civil Procedure §§ 1021.7 and 1038.

18 **SIXTEENTH AFFIRMATIVE DEFENSE**

19 These answering defendants contend that plaintiffs' action is barred by the doctrine of *res*
20 *judicata* and that certain claims pursued herein are barred by the doctrine of *collateral estoppel*.

21 **SEVENTEENTH AFFIRMATIVE DEFENSE**

22 These answering defendants allege that plaintiffs' claim for damages is barred to the extent
23 of any damages incurred more than six months prior to the filing of his claim pursuant to the
24 California Government Code §900 et seq., and particularly §§ 905, 910, 911.2, 911.4, 945.6 and
25 946.6.

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EIGHTEENTH AFFIRMATIVE DEFENSE

These answering defendants allege that plaintiffs have waived their right to maintain the action filed in this case.

WHEREFORE, these answering defendants pray that plaintiffs take nothing by their complaint, for costs of suit herein, and for such other and further relief as to the Court may seem reasonable and proper.

DATE: December 21, 2007

HOWARD ROME MARTIN & RIDLEY LLP

By: /s/ JOSEPH C. HOWARD, JR.
Joseph C. Howard, Jr.
Attorneys for Defendants
KENNETH VITORELO, JACK AIELLO
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NOTICE OF INTENT TO SEEK ATTORNEYS' FEES

TO PLAINTIFFS AND TO THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that Defendants contend that plaintiffs' complaint was not filed nor maintained in good faith or with reasonable cause and that these defendants are entitled to and intend to seek reasonable attorneys' fees from the plaintiffs and from plaintiffs' attorney of record, pursuant to Title 42 U.S.C. §1988 and Code of Civil Procedure §§ 1021.7 and 1038.

DATE: December 21, 2007

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Joseph C. Howard, Jr.
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and CITY OF SAN CARLOS

JURY DEMAND

These answering Defendants hereby demand a trial by jury in this action.

DATE: December 21, 2007

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Joseph C. Howard, Jr.
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